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SUPREME COURT OF THE UNITED STATES

On Appeal from the Supreme Court of Indiana.

International Harvester Company and International Harvester Company of America,

Appellants,

Department of Treasury of the State of Indiana, M. Clifford Townsend, Joseph M. Robertson, ...

Appellees.

APPELLANTS' BRIEF

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IN THE

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October Term, 1943

On Appeal from the Supreme Court of Indiana

International Harvester Company and International Harvester Company of America, *Appellants*, *v.* Department of Treasury of the State of Indiana, M. Clifford Townsend, Joseph M. Robertson, and Frank G. Thompson, as Members of and Constituting the Board of Department of Treasury, *Appellees*.	No. 355

APPELLANTS' BRIEF

The case below is not yet reported in the Indiana official reports. It is found in 47 N. E. (2d), at page 150.

GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

The jurisdiction of this Court is invoked on the ground that the judgment of the Supreme Court of Indiana sus-

tains taxes on transactions in interstate commerce in violation of the commerce clause of the federal Constitution and denies the appellants due process of law under the Fourteenth Amendment to the federal Constitution.

CONCISE STATEMENT OF THE CASE

This appeal involves the validity of the exaction of the Indiana gross income tax on gross receipts from three classes of sales made by the appellants in the years 1935 and 1936.

The tax was imposed by Section 2 of Chapter 50 of the Acts of the General Assembly of Indiana for the year 1933 (Acts of 1933, page 388), found in Burns Indiana Statutes Annotated, Section 64-2602. The rate of tax on wholesale sales was ¼% and on retail sales 1% (see Section 3 of said Act). Wholesale sales are sales for resale. Retail sales are sales to the consumer. *Storen v. J. D. Adams Mfg. Co.*, 212 Ind. 343, 7 N. E. (2d) 941.

Recovery of such taxes was denied by the Supreme Court of Indiana by its decision in this case.

The International Harvester Company is a New Jersey corporation with general offices in Chicago, Illinois (R. 23). The International Harvester Company of America was a Wisconsin corporation, all the capital stock of which was owned by the International Harvester Company, the parent company (R. 23). In 1935 the International Harvester Company of America marketed in Indiana the products manufactured by the International Harvester Company (R. 24). In 1936 the International Harvester Company marketed its own products directly, and the International Harvester Company of America has since been dissolved

(R. 23). By stipulation of the parties, it was agreed that the International Harvester Company should be treated as the sole plaintiff in this action (R. 24-25) and for that reason we use the word "appellant" hereinafter in this brief as covering both companies.

All the sales of the appellant are made through its selling branches. No sales are made by the factories (R. 33). The sales are made by the branches on orders received by the branches by mail or solicited by their salesmen (R. 33). All orders are subject to approval and acceptance by the Company's branch manager of the branch making the sale (R. 32). The general transfer warehouses of the Company are all located outside the State of Indiana, namely at Chicago and Moline, Illinois, Kansas City, Council Bluffs and St. Paul (R. 26).

The International Harvester Company had in 1935 and 1936 factories in Illinois, Ohio, Tennessee, New York, Wisconsin and Louisiana and two factories in Indiana, one at Fort Wayne, manufacturing motor trucks, and one at Richmond, manufacturing seeding machines and small tillage implements (R. 25). It had more than 100 selling branches in the United States (R. 55). Four of these selling branches were in Indiana at Indianapolis, Fort Wayne, Terre Haute and Evansville (R. 25), which sold to dealers and consumers in their trade areas, including parts of Indiana and parts of Ohio, Illinois and Kentucky (R. 28-31). It had a motor truck branch in Chicago selling in the Chicago trade area, including part of Lake County, Indiana (R. 28, 31), and general branches at Kankakee, Illinois, Louisville, Kentucky, and Cincinnati, Ohio, selling to buyers and consumers in the states where they were

located and also to dealers and consumers located in certain parts of Indiana (R. 30).

The branch house areas have been established for many years and long before the Indiana Gross Income Tax was enacted in 1933. The branch houses at Fort Wayne, Indianapolis, Terre Haute, Evansville and Cincinnati have been located at the above places since November 1, 1902. The branch house at Kankakee has been located there since November 1, 1903. The Louisville branch house was originally located there on November 1, 1902, but it was moved across the Ohio River to New Albany, Indiana, on October 12, 1911, and then back to Louisville on December 1, 1922, where it has since remained. The Chicago Motor Truck Branch was established January 1, 1917 (R. 32).

The branch house at Cincinnati for many years has served a trade area consisting of territory in southwestern Ohio, northeastern Kentucky and southeastern Indiana (R. 30). The branch at Kankakee has handled a trade area consisting of territory along both sides of the state line, in Illinois and Indiana (Plaintiff's Exhibit 1, R. 70, 93; also R. 30). The branch at Fort Wayne has handled a trade area consisting of territory in northeastern Indiana and in Ohio along the Indiana-Ohio border (R. 29). The branch at Evansville has handled territory in the tri-state trade area in nearby Kentucky, Illinois and Indiana (R. 28-29). The branch at Louisville has served the trade area in nearby Indiana and Kentucky (Plaintiff's Exhibit 1, R. 70, 93; also R. 30).

John L. McCaffrey, Vice President in Charge of Sales of the Appellant, testified: "The territory of the company's branches has been assigned to them as a result of many years of being in the business. These territories are well established business and economic areas, and correspond

to the areas as to local freight distribution and commerce as adopted and established by other lines of business and trade associations." (R. 59.) He was asked why, for example, Indianapolis was picked as a branch house city, and replied: "Because Indianapolis is a natural trading center for a certain radius of miles of counties and territory surrounding Indianapolis." (R. 59.) When asked: "What makes Indianapolis a trading center?" he answered: "I think the natural trade established a city rather than the city establishing the trading center. That is the point I have always held. If it was not a natural trading center, it would not be there. The fact that people have come there over a period of years, a good many years, has made it a city. That is how it came to be a city." (R. 59.)

Then he was asked what would be the effect if the Company told dealers and consumers, for example, now in the territory in southern Indiana of the Louisville branch, that they must deal with the Evansville branch, or customers of the Evansville branch living in Kentucky that they must deal with the Louisville branch, and he replied that "it would not work, if you did that, for the reason that you cannot bring a customer with his money where you want him, because he will go where he wants to go. In other words, it is not a natural place for him to do business. So naturally he will not go there. So we would have a constant turmoil of trying to direct people where they should go instead of the natural place where they will go." (R. 60.)

The Appellant introduced in evidence three maps. The first, Plaintiff's Exhibit 1 (R. 70, 93) showed the branch house areas of the International Harvester Company in the United States. The second, Plaintiff's Exhibit 2 (R.

71, 94), was a map entitled "Map of Key Distribution Areas," copyrighted 1936, prepared by the Traffic World, a national transportation news weekly. The third map (Plaintiff's Exhibit 3) was prepared by the United States Department of Commerce, entitled "Wholesale Grocery Trading Areas," published in 1938, (R. 73, 95).

On each map, southeastern Indiana is included in a trade area which includes part of Ohio and Kentucky and centers in Cincinnati. On each map Louisville is the center of a trade area which includes part of southern Indiana and part of central Kentucky. On each map southwestern Indiana is part of a trade area centering in Evansville, which includes part of Illinois and Kentucky. On each map Indianapolis is the center of a trade area which includes a large part of the central area of the state. In the Traffic World map (R. 71, 94) and the International Harvester Company's map (R. 70, 93), Terre Haute is the center of a trade area including part of west central Indiana and east central Illinois, and on the United States Department of Commerce map (R. 73, 95) a large portion of east central Illinois is included in the trade area centering in Indianapolis. On the International Harvester Company's map and the Traffic World map, Fort Wayne is the center of a trade area including parts of northeastern Indiana and a few Ohio counties on the Ohio-Indiana state line. In the Department of Commerce map the area centering in Fort Wayne does not extend into Ohio. On all three maps, northwestern Indiana and part of northeastern Illinois are in the same trade area.

The Complaint as filed sought recovery of taxes paid on six classes of sales designated as Classes A, B, C, D, E and F, but in the course of the litigation the Department of

Treasury conceded the non-taxability of gross receipts from the shipments in carload lots in Classes A (R. 42) and E (R. 46) and conceded all of Class B (R. 43). The International Harvester Company conceded the taxability of sales in Class F (R. 47).

The trial court by its judgment entered April 29, 1942, held that the Appellant was not entitled to recover any of the taxes paid on the remaining sales in Class E, but that Appellant was entitled to recover taxes on receipts from sales in Classes A, C and D, and it rendered judgment accordingly (R. 18, 19).*

The Supreme Court of Indiana affirmed the judgment of the trial court in Appellant's favor as to Class A (not involved in the present appeal), affirmed the trial court's judgment against Appellant as to Class E, reversed the trial court's judgment in Appellant's favor as to Classes C and D, and directed the trial court to render judgment as indicated by the Supreme Court's opinion. The Court's opinion stated that the transactions in Classes C, D and E were subject to the Indiana Gross Income Tax because "Neither of these classes presents a possibility of double taxation, since no other State could impose such a burden in view of the conclusions reached in the *J. D. Adams* case." (R. 108-111).

Therefore, the three classes involved in this appeal are as follows:

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* The copy of the judgment of the trial court reproduced in the Record (R. 18-19) erroneously states as the finding of the trial court that Appellants should recover the tax paid on receipts from "retail sales in Classes A, C and D." The word "retail" did not so appear in the trial court's judgment. This error in the Record is inconsequential, however, because it elsewhere repeatedly appears in the Record that tax on both wholesale and retail sales was involved as to both the now remaining Classes C and D. See Stipulation of Facts filed with the trial court (R. 43-45).

Class C. Sales by branches located *outside* of Indiana; namely at Kankakee, Louisville and Cincinnati, and Chicago Motor Truck Branch, to dealers and consumers *residing in* Indiana, who went to the factory in Indiana, and there took delivery and possession of the purchased goods and transported the goods to their places of business or residence in Indiana. The goods were principally motor trucks manufactured at the Fort Wayne Works and a small amount of seeding machines and tillage implements manufactured by the Richmond Works. In all sales in this class the orders were accepted *outside* of Indiana and payment for the goods was received *outside* of Indiana. (R. 43-44.)

Class D. Sales by branches located *in Indiana,* namely at Evansville, Fort Wayne and Terre Haute, to dealers and consumers residing *outside* Indiana, who came to Indiana and took delivery of the purchased goods in Indiana and transported the goods back to their places of business or residence in Kentucky, Illinois or Ohio (R. 44-45).

Class E. Sales by branches *in Indiana* to dealers and consumers *in Indiana* of goods shipped by Appellant from *outside* the State of Indiana to buyers in the State of Indiana, pursuant to orders or contracts of sale specifying that shipment should be so made. The goods in Class E were manufactured outside Indiana (R. 45).

SPECIFICATION OF ASSIGNED ERRORS INTENDED TO BE URGED

Appellant urges the following errors assigned in its Assignment of Errors filed with the Clerk of the Supreme Court of Indiana on August 9, 1943 (R. 118):

"1. The Supreme Court of the State of Indiana erred in holding that the receipts of appellants from sales in Class C transactions are subject to the Indiana Gross Income Tax; and in refusing to hold that said tax on said receipts is an invalid and prohibited burden on interstate commerce under the commerce clause of the Constitution of the United States.

"2. The Supreme Court of the State of Indiana erred in holding that the entire gross receipts of appellants from sales in Class C transactions are subject to the Indiana Gross Income Tax without apportionment of said receipts between that part thereof derived from sources in Indiana and that part thereof derived from sources outside Indiana, and without limiting the application of said tax to that part of said receipts derived from Indiana sources; and in refusing to hold that said tax as applied to said receipts from Class C transactions is invalid under the due process clause of the Fourteenth Amendment to the Constitution of the United States.

"3. The Supreme Court of the State of Indiana erred in holding that the receipts of appellants from sales in Class D transactions are subject to the Indiana Gross Income Tax; and in refusing to hold that said tax on said receipts is an invalid and prohibited burden on interstate commerce under the commerce clause of the Constitution of the United States.

"4. The Supreme Court of the State of Indiana erred in holding that the entire gross receipts of appellants from sales in Class D transactions are subject to the Indiana Gross Income Tax without apportionment of said receipts between that part thereof derived from sources in Indiana and that part thereof derived from sources outside Indiana,

and without limiting the application of said tax to that part of said receipts derived from Indiana sources; and in refusing to hold that said tax as applied to said receipts from Class D transactions is invalid under the due process clause of Fourteenth Amendment to the Constitution of the United States.

"5. The Supreme Court of the State of Indiana erred in holding that the receipts of appellants from sales in Class E transactions are subject to the Indiana Gross Income Tax; and in refusing to hold that said tax on said receipts is an invalid and prohibited burden on interstate commerce under the commerce clause of the Constitution of the United States.

"6. The Supreme Court of the State of Indiana erred in holding that the entire gross receipts of appellants from sales in Class E transactions are subject to the Indiana Gross Income Tax without apportionment of said receipts between that part thereof derived from sources in Indiana and that part thereof derived from sources outside Indiana, and without limiting the application of said tax to that part of said receipts derived from Indiana sources; and in refusing to hold that said tax as applied to said receipts from Class E transactions is invalid under the due process clause of the Fourteenth Amendment to the Constitution of the United States." (R. pp. 118-120.)

SUMMARY OF ARGUMENT

The chief contention of appellant as to each of the Classes C, D and E involved in this appeal is that if the tax levied by the State of Indiana is sustained, the same gross receipts will be open to tax, without apportionment, in other states, and a multiple tax burden accordingly will be laid thereon which is forbidden by the commerce clause of the United States Constitution.

This is most strikingly shown in Class D. In Class D the Supreme Court of Indiana has sustained a tax by Indiana, the state of delivery, on the entire gross receipts and yet in its very opinion declares that this Court has held that the state of the buyer can tax the same entire gross receipts.

The state of the buyer in Class D is not Indiana, but Ohio, Kentucky or Illinois.

The Supreme Court of Indiana takes the position that this Court has held that "the tax may be levied by the buyer's state regardless of the incidental interstate nature of the transaction." It declares that none of the above Classes C, D or E "presents a possibility of double taxation since no other state could impose such a burden in view of the conclusions reached in the *J. D. Adams* case." In short, the Indiana Supreme Court concludes that this Court has held that the buyer's state can tax gross receipts in interstate transactions and that no other state can tax them and that, therefore, there is no danger of multiple taxation. And yet in this very case it has sustained a tax on Class D sales by the state of delivery!

The Indiana Supreme Court believes that the principle that the buyer's state may tax was "sustained" by the *per curiam* decision of this Court in *Allied Mills, Inc. v. Department of Treasury,* 318 U. S. 740, affirming without opinion the decision of the Indiana Supreme Court in *Department of Treasury v. Allied Mills, Inc.,* 42 N. E. (2d) 34. We believe this conclusion is based on a fundamental misunderstanding of the case of *J. D. Adams Mfg. Co. v. Storen,* 304 U. S. 307, and the New York City sales tax cases, one of which, *McGoldrick v. Felt & Tarrant Mfg. Co.,* 309 U. S. 70, was cited by this Court in the *per curiam* decision in the *Allied Mills* case.

We shall contend in our Argument *infra* that there are vital and controlling differences between the Indiana Gross Income Tax levied against the seller on gross receipts from all sources, including wholesale sales which were not conditioned on a local activity, and the New York City sales tax which was levied against the buyers on receipts from local services, and from retail sales conditioned on a local activity, i.e., the transfer of title or delivery of possession in New York City. These distinctions, we submit, this Court fully recognized in its decision in *McGoldrick v. Berwind-White Coal Mining Co.,* 309 U. S. 33, where it said that "The rationale of the *Adams Manufacturing Co.* case does not call for condemnation of the present tax. Here the tax is conditioned upon a local activity, delivery of goods within the state upon their purchase for consumption." (P. 58.)

It is our contention that if the tax on the Appellant's Classes C, D and E is sustained, the *Adams* case is in effect reversed, and the way is thrown open for the state of the seller, the state of the buyer, the state of the manu-

facturer, the state where the sales proceeds are received, and every other state which the transaction touches, to tax the entire gross receipts without apportionment.

We will now briefly take up the three classes in turn.

Class D Sales

We take up Class D sales first because Class D most strikingly presents the threat of multiple taxation of gross receipts from interstate commerce.

Briefly, again, Class D sales are sales by the branches at Evansville, Fort Wayne and Terre Haute to buyers in the territories of those branches *outside* of Indiana who came either to one of the above three branches or to the factory at Fort Wayne or Richmond, took delivery of the purchased goods and transported them back to their places of business or residence in Kentucky, Ohio or Illinois.

In Class D sales the state of the buyer was *outside* Indiana and the selling branches of the appellant were located inside Indiana. Therefore, the very reason given by the Supreme Court of Indiana in the instant case, namely, that this Court has held that the buyer's state can tax, does not, and indeed could not, apply to the tax on Class D sales, since Indiana is *not* the buyer's state in Class D sales.

It follows as an inescapable conclusion that if the Indiana Supreme Court is correct in its understanding that this Court has held that the state of the buyer can tax (namely, in Class D, Ohio, Kentucky or Illinois) and if the state of delivery (namely, Indiana) can also tax as the Indiana Supreme Court has actually held, then inevitably double taxation is involved.

Moreover, as we shall show below, Illinois in 1943 after this case was decided by the Indiana Supreme Court, amended its Retailers Occupation Tax to apply to all sales of an out of state seller to an Illinois consumer where the Illinois consumer gets delivery of the article in the state of the out of state seller and brings it to his home in Illinois.

That is, Illinois says that if an out of state seller sends an employee or other representative into Illinois to engage in selling activities, the out of state seller is engaged in the business of selling tangible personal property at retail in Illinois and is taxable on the gross receipts from a retail sale to an Illinois buyer notwithstanding that the buyer takes delivery of the article outside Illinois and brings it himself into Illinois.

In short, under this new amendment of the Illinois Retailers Occupation tax, if the branch of the International Harvester Company at Evansville or Terre Haute, both of which have Illinois territory, solicits a sale to an Illinois consumer and the Illinois consumer comes to the branch at Terre Haute or the branch at Evansville and gets the article and pays for it there and takes it back to his home in Illinois, the International Harvester Company is taxable on that sale under the Illinois Retailers Occupation tax as now amended.

Yet this is exactly the kind of sale that is also taxed in Indiana under Class D; that is, the Supreme Court of Indiana has held in this case that the branch at Terre Haute or the branch at Evansville is subject to the Indiana Gross Income Tax on the very same sale.

Class C Sales

We repeat briefly that Class C sales are sales by branches of the International Harvester Company located

outside of Indiana to dealers and consumers residing inside Indiana who took delivery of the goods themselves in Indiana.

It is true that there was no movement across state lines of the *articles* sold in Class C sales. But there was continuous intercourse across state lines in order to effect these sales. The branch in Ohio, Kentucky or Illinois solicited an order from the buyer in Indiana or the buyer in Indiana sent an order to the branch of the appellant at Cincinnati or Kankakee or Louisville. The branch at Kankakee, Cincinnati or Louisville accepted the order. The branch at Kankakee, Cincinnati or Louisville directed the Fort Wayne works of the appellant at Fort Wayne, Indiana, or the Richmond works of the appellant at Richmond, Indiana, to deliver the article to the buyer in Indiana. The buyer in Indiana made payment either in cash or notes to the branch at Kankakee, Louisville or Cincinnati.

This Court has held ever since the case of *Gibbons v. Ogden*, 9 Wheaton 1, that commerce is more than traffic, "it is intercourse", and it has held that the transmission of radio messages, telegraph and telephone messages, are transactions in interstate commerce.

The sales in Class C have every element of an interstate transaction except that the final delivery of the article to the buyer was made in Indiana.

We submit that if Indiana, the state of the buyer, can tax such transactions as Class C sales then the *J. D. Adams* case is in effect reversed and the way is thrown open for both the state of the seller and the state of the buyer to tax, without apportionment, gross receipts in interstate commerce transactions. There is no reason for preferring the state of the buyer to the state of the seller.

Class E Sales

Class E sales are sales by the branches in Indiana to buyers in Indiana where the order or contract of sale provided that the goods should be shipped and the goods were shipped from outside Indiana to the buyer in Indiana.

These sales come squarely within the rule of the case of *Sonneborn Bros. v. Cureton,* 262 U. S. 506, which held that such a transaction was in interstate commerce and that a gross receipts tax could not be laid on the proceeds.

Wiloil Corporation v. Pennsylvania, 294 U. S. 169, does not, we submit, modify the rule laid down in *Sonneborn Bros. v. Cureton, supra.* For in the Wiloil case this Court expressly stated that the contracts there involved "did not require or necessarily involve transportation across the state boundary" (p. 174). In our case the contracts did so require (R. 45).

ARGUMENT

Before proceeding to a consideration of the special issues involved in each of the Classes C, D and E, we wish to present the situation as we understand it which has resulted from the recent decisions of this Court.

The essential question on this appeal is whether the International Harvester Company can be required by the State of Indiana to pay tax on the entire gross receipts from interstate transactions when it will be laid open to a tax on the same entire gross receipts by other states which the transactions touch.

This Court has definitely held in the case of the very gross income tax now in question that interstate business cannot be required to pay the Indiana Gross Income Tax on the entire gross receipts received in interstate transactions.

In *J. D. Adams Mfg. Co. v. Storen,* 304 U. S. 307, the seller located in Indiana manufactured road machinery in Indiana, accepted orders for the sale thereof from buyers in other states and foreign countries and shipped the goods from the factory in Indianapolis to the buyers in other states and foreign countries. This Court held that the gross receipts from such sales by the J. D. Adams Mfg. Co. could not be taxed by Indiana under the Indiana Gross Income Tax. It said:

> "The vice of the statute as applied to receipts from interstate sales is that the tax includes in its measure, without apportionment, receipts derived from activities in interstate commerce; and that the exaction is of such a character that if lawful

> it may in substance be laid to the fullest extent by states in which the goods are sold as well as those in which they are manufactured. Interstate commerce would thus be subjected to the risk of a double tax burden to which intrastate commerce is not exposed, and which the commerce clause forbids. We have repeatedly held that such a tax is a regulation of, and a burden upon, interstate commerce prohibited by article 1, section 8, of the Constitution." 304 U. S. 307, 311.

This position was emphatically affirmed in the case of *Gwin, White & Prince, Inc. v. Henneford*, 305 U. S. 434, involving a state of Washington tax on gross receipts on the business of marketing fruit shipped from Washington to places of sale in other states and foreign countries. The Court adverted to the expression that "even interstate business must pay its way by bearing its share of local tax burdens," but said that it was "enough for present purposes that under the commerce clause, in the absence of Congressional action, state taxation, whatever its form, is precluded if it discriminates against interstate commerce or undertakes to lay a privilege tax measured by gross receipts derived from activities in such commerce which extend beyond the territorial limits of the taxing state. Such a tax, at least when not apportioned to the activities carried on within the state (citing cases) burdens the commerce in the same manner and to the same extent as if the exaction were for the privilege of engaging in interstate commerce and would, if sustained, expose it to multiple tax burdens, each measured by the entire amount of the commerce, to which local commerce is not subject." (Pp. 438-9.)

The decisions in the *J. D. Adams* case and the *Gwin, White & Prince* case definitely settled that since the Indi-

ana Gross Income Tax is a tax on gross receipts from all sources, wages, salaries, fees, commissions, interests, dividends and rents, and also receipts from sales, not only retail sales but wholesale sales, and since therefore it was a tax which if applied by one jurisdiction to the entire receipts can also be applied without apportionment to the entire gross receipts by two, three or half a dozen jurisdictions which the transactions touch, that therefore no one of them would be allowed to tax the entire gross receipts.

The decisions in *McGoldrick v. Berwind-White Coal Mining Co.,* 309 U. S. 33, and companion cases of *McGoldrick v. Felt & Tarrant Mfg. Co.,* and *McGoldrick v. A. H. DuGrenier, Inc.,* 309 U. S. 70, expressly approved the Adams case. These cases arose under the New York City sales tax of 1% on retail sales where transfer of title or delivery of possession of the goods was effected in New York City. The tax was not a general gross receipts tax levied on the seller as is the Indiana gross income tax but it was a tax on the buyer limited solely to receipts from retail sales and local services. In each case the buyer was located in New York City, the order was taken there and possession of the goods was delivered to the buyer there.

This Court sustained the tax in all three cases, stating that the tax was laid "upon every purchaser within the state of goods for consumption" (p. 49).

The Court distinctly recognized its previous opinion in *J. D. Adams Mfg. Co. v. Storen, supra,* but said emphatically: "The rationale of the Adams Mfg. Co. case does not call for condemnation of the present tax. Here the tax is conditioned upon a local activity, delivery of goods within the State upon their purchase for consumption" (p. 58).

The implication was clear that the Indiana Gross Income Tax was not conditioned on a local activity, and it was definitely held that the rule in the *J. D. Adams* case was not affected by the decision in *McGoldrick v. Berwind-White Coal Mining Co., supra,* and the companion cases.

The Indiana Supreme Court, however, seems to think that this conclusion was thrown in doubt by the case of *Allied Mills, Inc. v. Department of Treasury,* 318 U. S. 740, rehearing denied 801, 87 Law. Ed. 514, 724, 63 S. Ct. 666, 830, where this Court affirmed the judgment of the Supreme Court of Indiana in a *per curiam* opinion, merely citing the cases of *McGoldrick v. Felt & Tarrant Mfg. Co.,* 309 U. S. 70, and *Felt & Tarrant Mfg. Co. v. Gallagher,* 306 U. S. 62.

The facts in the case of *Allied Mills, Inc.* were the reverse of the facts in the *Adams* case. In the *Allied Mills* case the sale of livestock feeds was made by Allied Mills, Inc., an Indiana corporation, to buyers in Indiana, on contracts approved by factory branches of Allied Mills in Illinois, and the feeds were shipped from those factory branches to the buyers in Indiana.

The Indiana Supreme Court in its opinion in the instant case upheld the tax on all three Classes, C, D and E, on the authority of the *Allied Mills* case. It stated:

> "In *Department of Treasury v. Allied Mills, Inc.,* 42 N. E. (2d) 34, we interpreted the *Adams* case as meaning that the tax may be levied by the buyer's state regardless of the incidental interstate nature of the transaction. This view was sustained by the Supreme Court: *Allied Mills v. Department of Treasury* (1943), 318 U. S. 740.

"Applying the above decisions to the case at bar, it seems clear that transactions under Classes C, D and E are subject to our gross income tax. Neither of these classes presents a possibility of double taxation, since no other state could impose such a burden in view of the conclusions reached in the J. D. Adams case." (47 N. E. (2d) 150, 152).

Since the *per curiam* decision of this Court in the *Allied Mills* case affirmed the decision of the Supreme Court of Indiana reaching a result directly contrary to the definite rule of the Adams case (which was approved in *McGoldrick v. Berwind-White Coal Mining Co., supra*), we can only conclude that this Court in its memorandum opinion in the *Allied Mills* case, where it merely cited *McGoldrick v. Felt & Tarrant Mfg. Co.*, decided on the same day as the *Berwind-White Coal Mining Co.* case, its companion case, and a California Use Tax case, *Felt & Tarrant Mfg. Co. v. Gallagher*, 306 U. S. 62, did not realize that the *Allied Mills* case involved a gross income tax on gross receipts from wholesale sales in interstate commerce under the Indiana Gross Income Tax Act, an entirely different tax from those considered in the two cases cited.

As we have noted, this Court said in the *Berwind-White* decision that "the rationale of the J. D. Adams Manufacutring Co. case does not call for condemnation" of the New York City tax. *McGoldrick v. Felt & Tarrant Mfg. Co., supra*, would therefore be no authority for sustaining the tax in the *Allied Mills* case.

Felt & Tarrant Mfg. Co. v. Gallagher, supra, was a case under the California Use Tax, a tax conditioned on a local activity, namely, the use of the article in the state

of California, and wholly different from a tax on gross receipts from all sources.

The Supreme Court of Indiana, however, in its opinion in the case at bar, interpreted the *per curiam* opinion of this Court in the *Allied Mills* case as meaning that the state of the buyer may levy a gross income tax, without apportionment, on gross receipts from sales by a seller in another state, although the *ratio decidendi* of the decision in the *Adams* case denied the right of the state of the seller to levy the Indiana Gross Income Tax, without apportionment, on gross receipts from interstate commerce transactions, and the rationale of that decision denied the right of any state to levy a tax in that form on interstate sales.

The state court's conclusions therefore are that this Court has held that the state of the buyer may levy such a tax and that no other state can impose a similar burden. We submit that both these conclusions are wholly unauthorized by the decisions of this Court, and that this theory, far from being supported by the *J. D. Adams* case, is flatly opposed to the rule laid down in the *Adams* case which was reaffirmed in *Gwin, White & Prince, Inc. v. Henneford*, 305 U. S. 434.

We do not understand that the *Adams* case means, in the words of the Indiana Supreme Court in this case, that the tax may be levied by the buyer's state regardless of the incidental interstate nature of the transaction. We understand rather that this Court held in the *Adams* case and in the *Gwin, White & Prince* case that if the state of the seller could tax the entire gross receipts, without apportionment, then the state of the buyer, the state of the manufacturer, the state of approval of the contract and

receipt of the sales proceeds, and all other states which the transaction touches, could do likewise, and that there was consequently a danger of multiple taxation, and accordingly that no state would be allowed to tax the entire gross receipts of such a transaction.

The New York City sales tax case of *McGoldrick v. Felt & Tarrant Mfg. Co., supra,* and the California use tax case of *Felt & Tarrant Mfg. Co. v. Gallagher, supra,* which this Court cited in its memorandum opinion in the *Allied Mills* case, involved taxes entirely different in their scope and nature from the Indiana Gross Income Tax, as this Court itself held in the *Adams* case, and reaffirmed in the *Berwind-White Coal Mining Co.* case. The New York City tax as applied by this Court in the above and companion cases, is a tax laid on the *buyer,* measured by receipts only from retail sales where the seller's office which handled the business and the buyer were both located in New York City, and the tax was conditioned on a local event, namely, the passing of title or transfer of possession in New York City. This local event could take place only once, and only in one place.

The California Use Tax obviously was a tax on a local event occurring in only one jurisdiction.

The Indiana tax, however, is a tax on the *seller,* laid on gross receipts from both wholesale and retail sales, and from wages, salaries, rents, interest, profits and gains of all kinds. It is laid not only on retail sales as the New York City tax was, but also on wholesale sales. In the case of a retail sale this Court pointed out in the New York City cases that the article "has been transported in interstate commerce and brought to its journey's end." *McGoldrick v. Berwind-White Coal Mining Co., supra,* page 49.

In the case of a wholesale sale, however, the article has not come to its journey's end but is to be resold by the purchaser. Therefore, as this Court also said in the New York City cases, the New York City tax did not lay the purchaser open to the danger of multiple taxation. But the obligation of the Indiana tax is laid on the seller, and inevitably lays the seller open to the threat of multiple taxation.

. . . . .

We believe that the foregoing analysis of the recent history of the cases involving interstate commerce taxation has been necessary before we proceed to an examination of the tax in each of the classes involved in this appeal.

We now wish to take up each class in turn.

I.

THE TAX ON CLASS D SALES WOULD LAY THE APPELLANT OPEN TO THE THREAT OF A MULTIPLE TAX BURDEN ON GROSS RECEIPTS FROM THE SAME TRANSACTIONS AND THEREFORE WOULD BE A BURDEN ON TRANSACTIONS IN INTERSTATE COMMERCE, FORBIDDEN BY THE COMMERCE CLAUSE.

We take up Class D sales first because Class D most strikingly presents the threat of multiple taxation on gross receipts from interstate transactions. It presents the question whether a tax will be sustained by the state where delivery to the buyer takes place when at the same time the way is laid open for a tax to be imposed by the state where the buyer resides and also by every other state which the transaction touches.

Class D sales are sales by an International Harvester branch house in Indiana to a buyer, either a dealer or

consumer, in Kentucky, Ohio or Illinois, where the goods were delivered to the buyer in Indiana and taken by the buyer back to his home town in Kentucky, Ohio or Illinois.

This Court has repeatedly held that the purchase of goods in one state for the purpose of transporting them immediately to another state is a transaction in interstate commerce.

In *Dahnke-Walker Milling Co. v. Bondurant,* 257 U. S. 282, in which the Dahnke-Walker Company purchased wheat in Kentucky, where the wheat was put on board railroad cars and shipped to the mill of the Dahnke-Walker Company in Union City, Tennessee, this Court held that the transaction was a transaction in interstate commerce. The Court said (p. 290) that "where goods are purchased in one State for transportation to another the commerce includes the purchase quite as much as it does the transportation."

The same language was used in *Currin v. Wallace*, 306 U. S. 1, involving the constitutionality of the Tobacco Inspection Act applying to the sale of tobacco at auction: It was objected that the sale of tobacco at auction in one state was an intrastate transaction, but the Court held that the auction was manifestly a part of the transaction of sale, and that so far as the sales were for shipment to other states or to foreign countries, "it is idle to contend that they are not sales in interstate or foreign commerce and subject to congressional regulation" (p. 10).

To the same effect is *United States v. Rock Royal Co-operative, Inc.,* 307 U. S. 533.

The fact, then, that the transactions in Class D are in interstate commerce necessarily throws them open to

attempts to tax by the state of delivery, by the state of the buyer, and by other states which the transaction touches. This being so, we submit that the vice of multiple taxation, which this Court has specifically found obnoxious to the commerce clause in the *Adams* case and the *Gwin, White & Prince* case, equally renders the Indiana gross income tax unconstitutional as applied to sales in Class D.

Before passing to a further discussion of this contention, however, we desire to bring briefly to the Court's attention the fact that, as respects Class D sales, the very words of the Indiana Supreme Court itself in its opinion in the case at bar demonstrate that sales in that class cannot constitutionally be taxed. As we have stated above, the Indiana Supreme Court in its opinion announced two conclusions: (1) that this Court by its memorandum opinion in the *Allied Mills* case held that the buyer's state can tax and (2) that in the case at bar there is no danger of multiple taxation because no other state can tax. So far as the opinion shows, these propositions constituted the *ratio decidendi* of the Indiana Supreme Court in its opinion. While we do not agree with either conclusion and think that both conclusions are based on a crucial misunderstanding of the decisions of this Court in the *Adams* case and in the New York City cases, we point out that *if* the conclusions of the Indiana Supreme Court are correct, Class D sales would, for no other reasons than those stated by the Indiana Supreme Court, have to be held exempt from the Indiana Gross Income Tax. For in the case of all Class D sales the state of the buyer is Ohio, Kentucky or Illinois and the state of delivery to the buyer is Indiana. Hence, if only the state of the buyer can tax, certainly Indiana cannot tax in Class D sales. This irrefutable logic seems to have escaped the Indiana Supreme Court.

We do not believe, however, that the case at bar, or any other case involving state taxes on gross receipts from interstate commerce, is to be decided by the application of the rule that the state of the buyer can tax. We think, rather, that the controlling principle is to be found in the decisions of this Court in the *Adams* case and in the *Gwin, White & Prince* case, viz., that no state law can be held valid which attempts to levy a tax, without apportionment, on gross receipts from interstate commerce in any case where there is a danger that the same gross receipts will be taxed by another state or other states. Obviously, therefore, if the Indiana Supreme Court was correct in its conclusion that the state of the buyer can tax, it has by its *decision* that Indiana can tax Class D sales approved double taxation on the same gross receipts from interstate commerce, in the very teeth of the controlling principle enunciated by this Court in the *Adams* and *Gwin, White & Prince* cases.

In short, the "drive-away" sales which constitute Class D present inescapably the likelihood of double if not multiple taxation of the same gross receipts. In *Commissioner of Corporations and Taxation v. Ford Motor Company,* 308 Mass. 558, 33 N. E. (2d) 318, the identical situation was involved under the Massachusetts excise tax based on net income. The Ford Motor Company delivered automobiles to its out of state dealers at its factory at Somerville, Massachusetts, and the out of state dealers drove them to "their respective districts all of which were beyond the boundaries of this Commonwealth" (page 323). The Court held that these sales were sales in interstate commerce and could not be included as Massachusetts sales in the measure of the Massachusetts excise tax on foreign corporations.

We think it clear that it was because of this manifest possibility of multiple taxation in gross receipts tax cases that this Court held in the *J. D. Adams Mfg. Co.* case and in *Gwin, White & Prince, Inc. v. Henneford, supra,* that where the transaction was such that if one state could tax the entire gross receipts, then four, five or six could do so, then none of them would be permitted to do so.

We do not understand that it is necessary for the taxpayer to show that there has been actual multiple taxation in such cases. This Court definitely held in the *Adams* and *Gwin, White & Prince* cases not merely that actual multiple taxation of gross receipts from interstate transactions would not be permitted, but that a situation would not be permitted to arise where such multiple taxation could be imposed. It refused in those cases to sustain the tax, because to sustain it would authorize other states to impose similar taxes. In *Gwin, White & Prince, Inc. v. Henneford, supra,* the Court said (page 440):

> "Unlawfulness of the burden depends upon its nature measured in terms of its capacity to obstruct commerce and not on the contingency that some other state may first have subjected the commerce to a like burden."

It is not, therefore, merely a multiple tax which is forbidden. It is also the possibility or threat of multiple taxation which this Court has resolutely opposed.

If the rule laid down by the Supreme Court of Indiana is sustained that the buyer's state can tax gross receipts from interstate sales, the state in which the buyer lives will surely be encouraged to assert the right to tax the seller on the gross receipts of the sale.

Indeed, it is apparent that the opportunity for the buyer's state to tax the sale on gross receipts from such sales as Class D sales is too tempting to be resisted. An actual demonstration of an attempt to that end has already been given by the State of Illinois.* Since the decision of the Indiana Supreme Court in this case, the Illinois Legislature in 1943 amended the Illinois Retailers' Occupation Tax (S. B. 512, Illinois Laws 1943, effective July 1, 1943) by adding Section 1b. The amendment provides that a "person" is engaged in the business of selling tangible personal property at retail in Illinois whenever that person habitually engages in selling activities in Illinois, the primary purpose of which is to promote the sale at retail of tangible personal property by such person, and that such person is subject to the Illinois Retailers' Occupation Tax, notwithstanding that the orders for such property are accepted outside Illinois, and notwithstanding that the tangible personal property which is sold as the result of such selling activities was not in Illinois at the time of sale, and notwithstanding that the ownership or title to the tangible personal property is not transferred in Illinois to the purchaser. In other words, under the new amendment of the Illinois Retailers' Occupation Tax (assuming its validity) if a buyer living in Illinois purchases an article from the Terre Haute branch of the International Harvester Company, or from the Evansville branch, both of which have Illinois territory, and obtains delivery of that article in Indiana and brings the article back himself to his home in Illinois, the International Harvester Company would be a "person" engaged in selling activity in Illinois and would be subject to the Illinois Retailers' Occupation Tax on the sale. And yet, if the Indiana Supreme Court is right in

its decision in the instant case, the International Harvester Company will also be subject to the Indiana Gross Income Tax on the same sale, since the sale is a class D sale.

In summary as to Class D sales, we submit that the transactions were transactions in interstate commerce and that they should have all the protection from multiple taxation that is granted to sales in interstate commerce. The threat of multiple taxation in Class D is immediate and real. The Supreme Court of Indiana has already held that the state of delivery can tax. The Supreme Court of Indiana has already held generally that the state of the buyer can tax. There is not only a threat of double taxation but of multiple taxation by every state which the transaction touches.

II

THE TAX ON CLASS C SALES LAYS THE APPELLANT OPEN TO THE THREAT OF A MULTIPLE TAX BURDEN ON GROSS RECEIPTS FROM THE SAME TRANSACTION, AND THEREFORE IS A BURDEN ON TRANSACTIONS IN INTERSTATE COMMERCE, FORBIDDEN BY THE COMMERCE CLAUSE.

Class C sales are sales by branches of the International Harvester located *outside* the State of Indiana to dealers and consumers *residing in* Indiana, who took delivery of the goods themselves in Indiana. The goods were principally motor trucks manufactured at the Fort Wayne Works of the Appellant at Fort Wayne, Indiana, and a small amount of tillage implements manufactured by the Richmond Works at Richmond, Indiana. The branches which made the sales were in Ohio, Kentucky or Illinois. A branch outside Indiana accepted the order or contract, and

directed the factory in Indiana to deliver the goods to the buyer who would call for them. The branch outside Indiana received the entire sales proceeds, either cash or notes, and when the notes were due received payment on the notes.

In Class C sales it is submitted that the interstate transaction was unbroken from the time the contract was made by a sales branch at Cincinnati, Louisville or Kankakee to the buyer in Indiana until the motor truck or seeding machine reached the buyer's home town in Indiana. The transaction started with a contract made in Ohio, Kentucky or Illinois and was not completed until the goods came to rest at the buyer's home town in Indiana.

From the day of *Gibbons v. Ogden*, 9 Wheaton 1, it has been recognized, in the words of Chief Justice Marshall, that commerce is "undoubtedly traffic but it is something more, it is intercourse. It describes the commercial intercourse between nations and parts of nations in all its branches and is regulated by prescribing rules for carrying on that intercourse."

It has been held that the transmission of telegrams, of telephone messages and of radio messages are transactions in interstate commerce.

Pensacola Telegraph Co. v. Western Union Telegraph Co., 96 U. S. 1;

Fisher's Blend Station, Inc. v. State Tax Commission, 297 U. S. 650;

Newfield v. Ryan, 91 Fed. (2d) 700, Certiorari denied 302 U. S. 729, Rehearing denied 302 U. S. 777;

Cooney v. Mountain States Telephone & Telegraph Co., 294 U. S. 384.

The evidence showed that the business involved in Class C sales was handled by branches which for a long time had served territories including areas in Indiana. The branches at Cincinnati, Louisville and Kankakee and the motor truck branch at Chicago were established many years ago.

There was also evidence showing a material saving in delivery charges by the dealer making his own delivery. Plaintiff's Exhibit No. 6 showed, for example, that an independent trucking company's charge for a driveaway from the Fort Wayne Works to Brookville, Indiana, would be $10.81, and if the truck were delivered from the Cincinnati branch house the charge would be $36.50. If a dealer went to Fort Wayne and got the truck himself and drove it to Brookville, his cost would be only for his own time and his gas and oil and other expenses in driving from Brookville to Fort Wayne and back again to Brookville. (R. 86, 99.)

If, therefore, a dealer or farmer in Indiana in the territory of the Cincinnati branch or the Kankakee or Louisville branch found that it would save him delivery expense to go to Fort Wayne and get his truck, or to go to Richmond, Indiana, and get his tillage implement, obviously that is what he would do. He was dealing with the branch he habitually dealt with, and was getting delivery in the cheapest and quickest way possible.

In Class C there is every interstate feature present except that to save transportation charges on shipments from the out of state branch the buyer obtained the goods at the factory in Indiana, and there was therefore no actual shipment across a state line. Under the decisions above cited, however, the transaction is nevertheless an interstate

sale of goods. There is an interstate sale between a seller outside the State of Indiana to a buyer inside Indiana.

In the *J. D. Adams* case, the seller's state sought to levy the tax. In Class C sales Indiana is the buyer's state and Indiana, the buyer's state, seeks to lay the tax.

This Court said in the *Adams* case that the seller's state could not tax gross receipts because to permit it to levy a tax of the character of the Indiana Gross Income Tax would lay the way open for the buyer's state also to levy a tax on the entire gross receipts. We submit that if Indiana, the state of the buyer, is permitted to levy the tax on the entire proceeds of Class C sales, then the *Adams* case is in effect reversed and the way is open both for the state of the buyer and the state of the seller to lay a gross income tax on the entire gross receipts. In short, we can see nothing sacrosanct about the state of the buyer.

We can see no reason, except for the protection afforded by the commerce clause, why Ohio or Kentucky or Illinois, the state of the seller in Class C, the state where the contract is approved and the sales proceeds received, could not tax the receipt of the entire sales proceeds.

In the case of Class C sales, therefore, as in the case of Class D sales, the question is how many states will be allowed to levy a gross income tax on the entire gross receipts from an interstate transaction? None, under the applicable decisions of this Court, unless the tax is so apportioned by legislative enactment, federal or state, as to prevent the penalizing of interstate commerce.

III.

Class E

CLASS E SALES ARE SALES IN INTERSTATE COMMERCE, AND INDIANA'S ATTEMPT TO LEVY A GROSS INCOME TAX ON THE ENTIRE GROSS RECEIPTS THEREFROM CASTS AN UNCONSTITUTIONAL BURDEN ON INTERSTATE COMMERCE.

Class E sales are sales by branches of the International Harvester Company located inside Indiana to dealers and consumers in Indiana of goods shipped from *outside* the State of Indiana, pursuant to orders or contracts specifying that shipment should be so made.

For many years it has been generally agreed that where goods are shipped by a seller in one state to a buyer in another state the sale is in interstate commerce and that the gross receipts therefrom are not subject to tax either by the state from which the goods are shipped or by the state to which they are shipped.

This Court so held in *Sonneborn Bros. v. Cureton*, 262 U. S. 506.

In *Wiloil Corporation v. Pennsylvania*, 294 U. S. 169, this Court stated that the *Sonneborn* case rule did not apply where there was no provision in the contract for interstate shipment and interstate shipment was "not required or contemplated" (p. 175).

But in Class E sales the interstate shipment was required and contemplated; it was made pursuant to a specification in the order or contract. (R. 45.) And the evidence also showed that there were compelling business reasons

for making the shipment from outside of Indiana to the buyer in Indiana, either because the freight was cheaper that way or because the branch in Indiana did not have the goods on hand when shipment was required, or for both reasons. (R. 33; 62-63; 77; Plaintiff's Exhibit 5, R. 84, 97.)

IV.

A TAX ON APPELLANT'S GROSS RECEIPTS FROM SALES IN CLASSES C, D AND E IS A TAX ON PROPERTY LOCATED AND BUSINESS DONE OUTSIDE THE STATE OF INDIANA, IN VIOLATION OF THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.

The Indiana Gross Income Tax is a tax on the entire gross receipts derived from the sale of goods in Classes C, D and E. These gross receipts arose from the entire activity, partly manufacturing, partly selling, partly administrative. No apportionment is made or attempted by the statute between that part of the gross receipts arising from Indiana activities and that part of the gross receipts arising from activities outside Indiana.

In Class C all the selling activities were conducted by branches outside of Indiana. In Class E the manufacturing was done outside Indiana. In Class D the purchasers were outside of Indiana and the sales proceeds therefore came from outside Indiana.

It is obvious therefore that the entire gross income in all of the Classes, C, D and E, was derived from activities partly inside and partly outside Indiana. Yet the State of Indiana has laid a tax on the entire gross receipts without apportionment.

In *Hans Rees Sons v. North Carolina*, 283 U. S. 123, this Court held that where the corporation manufactured its goods in North Carolina and sold them in New York, the entire net income from the manufacture and sale of the goods could not under the due process clause be taxed "in one state regardless of the extent to which it may be derived from the conduct of the enterprise in another state." (p. 133.) *A fortiori*, one state cannot under the due process clause tax the entire gross income from goods manufactured in one state and sold in another or the entire gross income arising from a series of transactions of manufacture and sale in more than one state.

CONCLUSION

In conclusion we submit:

1. The taxes involved in Classes C, D and E are gross income taxes on transactions in interstate commerce, are levied, without apportionment, on the entire gross receipts, lay the way open for double or multiple taxation on the same gross receipts, manifestly cast a burden on interstate commerce, and therefore are in violation of Article I, Section 8, of the Constitution of the United States.

2. The taxes involved in Classes C, D and E, being levied on the entire gross receipts from such sales without attempt by the State of Indiana to limit the tax to the activities carried on within Indiana, violate the due process clause of the Fourteenth Amendment to the Constitution of the United States.

3. This Court's *per curiam* opinion in the *Allied Mills* case gave rise to the confused thinking which vitiates the opinion of the Supreme Court of Indiana in the case at

bar. Because this Court, in that *per curiam* opinion, cited two cases (one involving a tax conditioned solely on a local activity and the other involving a use tax, and neither involving a gross receipts tax) which two cases sustained taxes by the state of the buyer, the Supreme Court of Indiana comes to the conclusion that this Court has now laid down the following rules to govern all cases involving state taxation of gross receipts from interstate commerce, viz.: (a) that the buyer's state can tax; (b) that no other state can tax. The confusion created by these unwarranted assumptions can only be clarified by an opinion of this Court enunciating the true rule. That rule, we submit, is that, in the absence of congressional permission or of state legislative action equitably apportioning the gross receipts between the several states which the transaction touches, no state can constitutionally lay a gross income tax on the gross receipts from interstate commerce. Certainly this is true if, as in the instant case, there exists a real threat of double or multiple taxation on gross receipts from interstate transactions.

Respectfully submitted,

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Attorneys for Appellants.

APPENDIX A

Indiana Gross Income Tax (as in effect in 1935 and 1936) Chapter 50, Acts 1933, page 388; Burns Indiana Statutes Annotated, 1933, Section 64-2602.

Sec. 2. There is hereby imposed a tax, measured by the amount or volume of gross income, and in the amount to be determined by the application of rates on such gross income as hereinafter provided. Such tax shall be levied upon the entire gross income of all residents of the State of Indiana, and upon the gross income derived from sources within the State of Indiana, of all persons and/or companies, including banks, who are not residents of the State of Indiana, but are engaged in business in this state, or who derive gross income from sources within this state, and shall be in addition to all other taxes now or hereafter imposed with respect to particular occupations and/or activities. Said tax shall apply to, and shall be levied and collected upon, all gross incomes received on or after the first day of May, 1933, with such exceptions and limitations as may be hereinafter provided.

Sec. 3. The tax hereby provided for shall be imposed at the following rates:

* * *

(b) Upon the entire gross income of every person engaged in the business of wholesaling and/or jobbing tangible commodities not specifically mentioned in subsection (d) of this section, one-fourth (¼) of one (1) per cent.

(c) Upon the entire gross income of every person engaged in the business of retailing of any tangible com-

modity or commodities not specifically mentioned in subsection (d) of this section, one (1) per cent.

* * *

Sec. 6. There shall be excepted from the gross income taxable under this act:

(a) So much of such gross income as is derived from business conducted in commerce between this state and other states of the United States, or between this state and foreign countries, to the extent to which the State of Indiana is prohibited from taxing under the Constitution of the United States of America. * * *

Section 1b of Illinois Retailers' Occupation Tax, as added by S. B. 512, Laws 1943, effective July 12, 1943. Smith-Hurd, Illinois Stat., Ch. 120, Sec. 440b:

Sec. 1b. (Person selling tangible personal property at retail.) For the purposes of this Act, a "person" is "engaged in the business of selling tangible personal property at retail in this State" whenever such "person", either himself, or through an employee or employees located in this State or coming into this State for the purpose, or through an agent or agents located in this State or coming into this State for the purpose, or through a representative or representatives located in this State or coming into this State for the purpose, or through an independent person or persons located in this State or coming into this State for the purpose and acting for such "person" (the seller) under a contract of agency, engages habitually, for livelihood or gain, in selling activity in this State, the primary purpose of which selling activity in this State is to promote the "sale at retail" of tangible personal property by such "person", as the phrase "sale at retail" is defined in this

Act. If a "person", or someone authorized to act on his behalf, engages habitually, for livelihood or gain, in selling activity in this State, the primary purpose of which selling activity is to promote the "sale at retail" of tangible personal property of such "person", such "person" is "engaged in the business of selling tangible personal property at retail in this State", notwithstanding the fact that orders for tangible personal property or offers to purchase tangible personal property resulting from such selling activity in this State are not accepted in this State by such "person" or by someone authorized to act on his behalf for this purpose, and notwithstanding the fact that the tangible personal property which is sold as the result of such selling activity in this State is not, at the time of its sale, located in this State, and nowithstanding the fact that the ownership of, or title to, such tangible personal property is not transferred in this State to the purchaser.